United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1403

To be argued by
T. GORMAN REILLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1403

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTONIO REYES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
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Preliminary Statement

Antonio Reyes appeals from a post-conviction order of the Honorable Charles L. Brieant, Jr., United States District Judge for the Southern District of New York, dated October 28, 1975. The order granted Reyes' motion made pursuant to Rule 35 of the Federal Rules of Criminal Procedure by reducing his sentence from a term of 12 years in prison to a term of 10 years. As before, the prison term is to be followed by a 3 year special parole period (A-16).*

The defendant's Rule 35 motion followed his unsuccessful appeal to this Court from the judgment of conviction entered against him on June 6, 1975 for violations of the

* "A" followed by a number refers to the Appendix filed by Appellant and the page thereof.

federal narcotics laws. The only issue presented on Reyes' direct appeal was whether the sentence imposed by the District Court was unduly severe. This Court affirmed the conviction in open court, finding no error. *United States* v. *Reyes*, — F.2d — (2d Cir. 1975) (A-42). In so doing the Court noted that its decision was without prejudice "to any rights that the appellant Reyes may have", including the filing of a Rule 35 motion in the District Court (A-42). Such a motion was filed on October 20, 1975. The full text of Judge Brieant's order granting the motion reads as follows:

> "The sole significant point raised in the annexed motion is that the Court, upon imposing sentence, may have incorrectly stated that defendant had suffered eleven criminal convictions in the past 14 years, while defendant's counsel claims that there is a variance in the records concerning Reyes' prior criminal conduct, caused apparently in part by his use of different names. Counsel for defendant contends that the record supports an inference of no more than 'seven or eight convictions.' The Court accepts the statements as true for purposes of this motion, and will reduce sentence accordingly.
>
> "The defendant is resentenced to serve a term of ten (10) years, to be followed by a three (3) year special parole, as required by Title 21 of the United States Code." (A-6)

ARGUMENT

POINT I

The District Court did not abuse its discretion in declining to reduce Reyes' sentence to a term of less than 10 years.

The nub of Reyes' argument is that the District Judge was not generous enough in granting his motion for a reduction in sentence. The argument is without merit.

In *United States* v. *Slutsky*, 514 F.2d 1222, 1226 (2d Cir. 1975), this Court summarized the principles applicable to appeals from Rule 35 motions:

> "A motion for reduction in sentence is 'essentially a plea for leniency and also affords the judge an opportunity to reconsider the sentence in light of any new information about the defendant or the case. . . .' United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918, 89 S. Ct. 241, 2 L. Ed. 2d 206 (1968). Ordinarily the disposition of the motion is within the sound discretion of the district judge, and the scope of appellate review is quite narrow. United States v. Stumpf, 476 F.2d 945 (4th Cir. 1973); United States v. Jones, 444 F.2d 89 (2d Cir. 1971)."

On this appeal Reyes raises little that he did not brief and argue in the original appeal from his conviction. Then, as now, he argued that the sentence was oppressively long when compared with sentences imposed in similar cases and when compared with the sentences meted out to other defendants in this case. But, of course, the law is well settled that so long as a sentence is within the maximum limits for the offense it is not subject to review. *Dorszynski* v. *United States*, 418 U.S. 424, 441

(1974); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 6, 1975). Counsel also argued in a reply brief on the first appeal that he had been able to document only six prior convictions whereas the Judge at sentencing referred to eleven convictions as set forth in the FBI and New York City Police Department arrest sheets on the defendant. By affirming the conviction the panel implicitly rejected the argument as insubstantial. In any event the District Court subsequently accepted counsel's representations concerning the number of prior convictions as true for purposes of the Rule 35 motion and granted what it deemed to be an appropriate reduction.*

The only new item offered for the Court's consideration is a charge that the District Court at the time of sentencing improperly considered the defendant's economic background. Aside from the fact that this supposed error occurred on the day of defendant's sentence and was never called to the District Court's attention either then or in connection with the subsequent Rule 35 motion, the record clearly discloses that defendant's deprived economic circumstances were not considered by the District Court as a factor militating toward the imposition of a harsher sentence. The Court's brief reference to the fact that defendant had been receiving welfare payments for the past six or seven years was in response to defense counsel's unqualified assertion that Reyes had been a working man (A-18). There is nothing in the minutes even to

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* Reyes now contends that the District Court erred in stating that it was his, Reyes, position that his prior record included at most seven or eight convictions when in fact his counsel had informed the Court that he had been convicted of no more than six petty offenses (Appellant's Brief, 7). This contention is frivolous. Clearly, there is no meaningful distinction between the two sets of figures. Further, the record demonstrates that the District Court accurately stated defendant's position (A-36).

suggest that the Court regarded Reyes' status as a welfare recipient as a factor adverse to Reyes in determining what sentence to impose upon him. The reasons underlying the Court's sentence were the gravity of the offense, defendant's status as a chronic offender, and the Probation Officer's evaluation that defendant's past performance gave little reason to believe that he would function in a law-abiding manner (A-20-A-21).

Considering that this Court has previously upheld the 12 year sentence originally imposed on Reyes and that the District Court actually granted his Rule 35 motion by reducing the sentence to 10 years, this appeal should be dismissed.

CONCLUSION

Defendant Reyes' appeal from the order of the District Court should be dismissed.

Respectfully submitted,

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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. Gorman Reilly being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20TH day of FEBRUARY 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

LAWRENCE H. LEVINE, ESQ
521 FIFTH AVENUE
NEW YORK, N.Y. 10021

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Gorman Reilly

Sworn to before me this
20TH day of FEBRUARY 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977